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In the Supreme Court of the United States

OCTOBER TERM, 1965.

No. 366.

McCULLOUGH TOOL COMPANY, *et al.*,
Petitioner,

vs.

WELL SURVEYS, INC. *et al.*,
Respondent.

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SUPPLEMENTAL BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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We file this Supplemental Brief only because of Petitioner's persistence in a position which has absolutely no support in the record and is contrary to fact. We refer to Petitioner's representation that after the expiration of the Bender and Fearon patents WSI had left only minor improvement patents, and that most of the operations of its licensees were uncovered by any patent. Petitioner not only makes this statement in its Reply Brief, but depicts it graphically in Appendix A thereto, which is not based on the record but is made up out of whole cloth.

The uncontroverted showing of the record is that, after the expiration of Bender and Fearon, WSI still had important unexpired patents in the radioactivity well logging field, *and that its licensees usually and normally used several of its unexpired patents in their radioactivity well logging operations* (See our main brief, pages 20 and 21 and Annex A).

Nor was this evidence "dredged up," as Petitioner states on page 3 of its Reply Brief. It was set forth *in extenso* on pages 4 to 7 of the Memorandum after Argument which we filed with the Court of Appeals at the time of the reargument of this case after this Court's decision in *Brulotte*. Petitioner had full opportunity to attempt to controvert this evidence on trial—if it thought it could—but did not even try to do so.

In this connection, Petitioner attempts in footnote 3 on page 2 of its Reply Brief to construe a statement of the Court of Appeals that the royalty base included operations covered by expired patents, as meaning that the royalty base included operations covered *only* by expired patents. The Court of Appeals made no such statement and, in view of the uncontroverted showing of the record, manifestly could have made none.

There is another respect in which Petitioner disregards the record. Petitioner argues that a licensee who wanted a license only under a particular patent or a few patents—whether at the time he first took a license from WSI, or later after exercising a right of termination—had no choice but to pay royalty on all operations within the radioactivity well logging field, including those covered by expired patents. This ignores the heart of WSI's purgation found by both lower courts. As shown on pages 11 to 15 of our main brief, the record shows that every licensee had a real alternative, at either time, of taking a license on reasonable negotiated terms under any one or more patents it wanted, and that, if it so desired, the royalty would be made payable only on a narrower base from which expired and unwanted patents were excluded.

Apart from the above, we believe all of Petitioner's contentions are fully answered in our main brief.

Respectfully submitted,

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